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In the Supreme Court of the United States

OCTOBER TERM, 1959

PAUL JOHN CARBO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Vol. III, 4-9) is not yet reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1960. The petition for a writ of certiorari was filed on April 20, 1960. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

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[1] The record consists of four volumes, each of which is separately paginated. Our record references will cite the respective volume numbers.

QUESTION PRESENTED

Whether the court below properly refused to quash a writ of *habeas corpus ad prosequendum* issued by a district court, addressed to state custodial officials outside the district, ordering them to produce the petitioner, a state prisoner, for trial in the federal district court.

STATUTES INVOLVED

28 U.S.C. 1651 provides in pertinent part:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> * * * *

28 U.S.C. 2241 provides in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> * * * *
>
> (c) The writ of habeas corpus shall not extend to prisoner unless:
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or,

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or,

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or,

(5) It is necessary to bring him into court to testify or for trial.

STATEMENT

A ten count indictment returned on September 22, 1959, in the district court for the Southern District of California charged the petitioner and four others with extortion and conspiracy, in violation of 18 U.S.C. 875 and 1951 (Vol. I, 2-16). The petitioner was arrested in Baltimore, Maryland, where he posted bond returnable to the district court for the Southern District of California sitting in Los Angeles. Prior to appearing in Los Angeles, the petitioner pleaded guilty to three misdemeanor charges in New York City, and was sentenced to serve a two year term of imprisonment and to pay a fine. The authorities at the New York City Prison honored a writ of *habeas corpus ad prosequendum* from the California district

court, and the petitioner appeared before the district court there on December 2 and 8, 1959, where he pleaded not guilty to the indictment (Vol. I, 18-19). The trial date was set for March 29, 1960, and the district court granted the petitioner's request to return to New York in order to obtain counsel (Vol. I, 19).

On March 16, 1960, the district court issued a writ of *habeas corpus ad prosequendum* to the Warden of the New York City Prison, directing that the petitioner be returned to Los Angeles for trial on March 29, 1960 (Vol. I, 28, 33A). The petitioner's motion to quash the writ was denied on the same day (Vol. II, 2). On appeal, the court of appeals unanimously affirmed this order (Vol. III, 9, 10). In view of the fact that the petitioner underwent a medical operation, the district court subsequently amended the return date of the writ to June 27, 1960, with the petitioner to be transported from New York to California after June 24th (Pet. App. "C" and "D"). The petitioner is scheduled to be tried with his co-defendants in the district court on July 12, 1960.

ARGUMENT

The sole question raised by the petition for a writ of certiorari is the power of the District Court for the Southern District of California to bring before it for trial a prisoner held by state officials in New York. At an earlier stage of this proceeding, the petitioner raised a question as to the propriety of bringing him to trial because of his illness. No such

issue is presently involved. The petitioner's trial has been postponed and there is no present question as to his ability to stand trial in July—an issue which in any event would be for the district court.

1. The petitioner's attack on the jurisdiction of the district court to issue the writ is without merit. The writ of *habeas corpus ad prosequendum* is the traditional method used for bringing a person already serving a sentence before a court for trial. *Barrett* v. *United States*, 270 F. 2d 772, 776 (C.A. 8); *United States ex rel Moses* v. *Kipp*, 232 F. 2d 147, 150 (C.A. 7); *Gunton* v. *Squier*, 185 F. 2d 470, 471 (C.A. 9); *Lunsford* v. *Hudspeth*, 126 F. 2d 653, 655 (C.A. 10); *Downey* v. *United States*, 91 F. 2d 223, 227 (C.A. D.C.); *Noble* v. *Botkin*, 153 F. 2d 228 (C.A. D.C.); 3 Blackstone, *Commentaries* 129-130; Black, *Law Dictionary* (4th Ed.) 837. Cf. *Price* v. *Johnston*, 334 U.S. 266, 281-284; *Ponzi* v. *Fessenden*, 258 U.S. 254, 261-262; *Ex parte Bollman*, 4 Cranch 75, 98. Just as a district court has the authority under 28 U.S.C. 1651(a), *supra*, p. 2, to issue an order for the production of a prisoner confined outside its territorial jurisdiction in a Section 2255 proceeding (*United States* v. *Hayman*, 342 U.S. 205, 221), the court also has the authority under 28 U.S.C. 1651(a), *supra*, to issue the writ of *habeas corpus ad prosequendum* to operate outside of its territorial jurisdiction. In each situation, the district court has jurisdiction of the subject matter (over the 2255 proceeding in one case, and the crimes charged in the indictment in the other) and is issuing process in aid of this jurisdic-

tion.[2] The present case is an even stronger one than

[2] The petitioner attempts (Pet. 6, 13-15) to draw an analogy to *Ahrens* v. *Clark*, 335 U.S. 188, by arguing that the authority of the district courts to issue writs of *habeas corpus ad prosequendum* derives from 28 U.S.C. 2241 (c) (5), *supra* p. 3, that that statute is the successor of 28 U.S.C. 452 (1940 Ed.), and that, since this Court construed 28 U.S.C. 452 in *Ahrens* to limit the authority to issue writs of *habeas corpus ad subjiciendum*, it follows that the courts' authority to issue writs of *habeas corpus ad prosequendum* is limited to their respective territorial jurisdictions. But 28 U.S.C. 2241 deals only with writs of *habeas corpus ad subjiciendum* since the words, "for the purpose of an inquiry into the cause of restraint of liberty", found in former Section 452, were omitted, not to amend its substance, but as merely descriptive of the writ involved. Reviser's Note, 28 U.S.C., p. 5079, following Section 2241. Subsection (c) (5) of Section 2241 refers, therefore, to a special category of prisoners who may invoke the aid of writs of *habeas corpus ad subjiciendum;* the subsection is not, as the petitioner asserts (Pet. 15), read out of the statute by the above construction.

The petitioner's reliance on *Edgerly* v. *Kennelly*, 215 F. 2d 420 (C.A. 7), certiorari denied, 348 U.S. 938, and *Goldberg* v. *Hoffman*, 225 F. 2d 463 (C.A. 7), is misplaced. *Edgerly*, a civil suit for damages, in which the subpoena power is more limited, and *Goldberg*, a mandamus proceeding, were overruled *sub silentio* by *United States ex rel Moses* v. *Kipp*, 232 F. 2d 147, 150 (C.A. 7), to the extent that they held that the district courts lacked the authority under 28 U.S.C. 1651(a) to issue writs beyond their respective territorial jurisdictions. Nor does *United States* v. *Kniess*, 251 F. 2d 669 (C.A. 7), help the petitioner. In that case, the court correctly held that it lacked the authority to issue a writ of *habeas corpus ad subjiciendum* beyond its territorial jurisdiction. In *Taylor* v. *McGrath*, 194 F. 2d 882 (C.A. D.C.), on which the petitioner also relies, the court merely held that mandamus was not a substitute for *habeas corpus*, and that, in any event, the petitioner was not entitled to a writ of *habeas corpus ad subjiciendum* because he was outside of the court's territorial jurisdiction.

Hayman, for the long history of the use of *habeas corpus* in these circumstances even more clearly falls within the requirement of Section 1651(a) that it be "agreeable to the usages and principles of law."

In both *Phillips* v. *Hiatt*, 83 F. Supp. 935 (D. Del.), and *In the Matter of Karol Van Collins*, 160 F. Supp. 165 (D. Me.), on which the petitioner relies, the *habeas corpus* proceedings were initiated by the prisoners involved in attempts to secure a speedy trial before the termination of sentences they were already serving. In denying relief, the court considered the request as similar to an inquiry into the legality of detention under 28 U.S.C. 2241(c)(5) and, accordingly, as limited by the territorial restrictions of 28 U.S.C. 2241(a) which limits jurisdiction to the district where the restraint occurs. Although some of the language in these cases appears inconsistent with the government's position here, we believe the cases are on their facts not against us, and that, in any event, this Court's decision in *Hayman* is controlling.

As for the reference by the petitioner (Pet. 11-12) to this Court's order in *De Simone* v. *United States*, 361 U.S. 125, it is probably not necessary to point out that the Court did not reach the merits of the case since it became moot by reason of that petitioner's release from custody before the petition was acted upon. This Court was concerned with whether the case was in fact moot and whether the petitioner was still subject to outstanding orders. However, in no respect did this Court's action reach the issue of the authority of the court in California to order the peti-

tioner's custodians in New York to bring him west to testify.

In a criminal case, particularly where a valid indictment is outstanding, a district court of the United States has jurisdiction outside its normal territorial limits. Under Rules 4 and 17, F. R. Crim. P., a court may issue a subpoena or a warrant of arrest to run anywhere in the United States. A writ of *habeas corpus ad prosequendum* is of the same nature since it is a means of bringing a defendant before the court. Thus, there is no extension of jurisdiction by the use of the writ.

2. In addition to the fact that the district court had authority to issue the writ, it appears that the petitioner has no standing to raise the issue. The writ is addressed by the United States District Court for the Southern District of California to the jailer of the New York City prison, in effect the State of New York. The issue of the right of the United States to ask for the delivery of the petitioner in California is a matter between the two sovereigns. *Ponzi* v. *Fessenden*, 258 U.S. 254; *Barrett* v. *United States*, 270 F. 2d 772 (C.A. 8); *United States ex rel Moses* v. *Kipp*, 232 F. 2d 147 (C.A. 7). The petitioner cannot be heard to complain of the procedure employed by one sovereign to secure his attendance for trial from the other sovereign.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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